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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

PIEDMONT AND NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, *Appellants,*

VERSUS

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, ET AL., *Appellees.*

No. 164

On appeal from U. S. District Court of Three Judges, for the Western District of South Carolina.

BRIEF FOR PIEDMONT AND NORTHERN RAILWAY COMPANY, APPELLANT

The Opinion Below

The opinion of the U. S. District Court of three Judges (R. 222) is reported in 30 Fed. Rep. (2d) p. 421; and the report of the Interstate Commerce Commission in 133 I. C. C., p. 363.

Jurisdiction

Only one question is presented, to-wit:

Whether the U. S. District Court of three Judges erred in entering the final decree (R. 252) dismissing the appellant, Piedmont and Northern Railway Company's petition, and refusing to enjoin, set aside, and annul, as unauthorized, that part of the order of the Interstate Commerce Commission, dated April 3, 1928, in which

the Commission determined that the authority conferred on it by paragraph (18) of Sec. 1 of the Interstate Commerce Act as amended by the Transportation Act, 1920, extended to the construction of new lines of railway by said appellant; the error urged being that, upon the facts established, it appears as a matter of law that said lines were to be constructed as parts of an interurban electric railway, not operated as a part of a general steam railroad system of transportation, within the meaning of paragraph (22) of said section, and were therefore by that paragraph exempt from the authority conferred on the commission by paragraph (18).

In the court below the Commission's asserted authority over the new lines was challenged upon the further ground that they were to be constructed as parts of an entire project undertaken prior to the effective date of paragraph (18); and this ground is covered by the assignments of error and the designation of points to be relied upon by appellants, but is now, after further consideration, abandoned.

No complaint is here made, and none was made in the court below, with respect to that part of the order merely refusing a certificate of public convenience and necessity; as a review of that portion of the order would involve but an exercise by the court of the administrative function of granting a request which the Commission denied, in contradistinction to the question presented of whether or not, upon the facts established, the Commission exceeded its authority under paragraph (18), and thereby deprived the appellant Company of the exemption expressly conferred by paragraph (22) upon interurban electric railways, which it is submitted, is purely a question of law, involving, merely the construction of a statutory provision and the application of the provision as construed to admitted

facts, and which therefore is clearly subject to judicial review.

The bases of jurisdiction of this court and of the court below are dealt with in appellants' separate statement on jurisdiction filed under Rule 12, paragraph 1; but assuming that the question of the jurisdiction of the court below is raised upon the record we desire to add the following on that question:

Great Northern R. Co. v. *U. S.*, 277 U. S., 172, when read in connection with *Texas & P. R. Co.* v. *Gulf C. & S. F. R. Co.*, 270 U. S. 266, would seem to put at rest all doubt, if any could have existed, about the jurisdiction of the court below to entertain this suit under the Urgent Deficiencies Act (Ch. 32, 38 Stat. 200, 220; U. S. C. Tit. 28, Secs. 41 (28) and 47, 47-a). In the Great Northern case it was held that a certificate issued by the Commission pursuant to Sec. 209 of the Transportation Act, 1920, of the amount due the Great Northern upon the termination of Federal control under the guaranty of revenue, was not within the scope of the remedy provided by the Urgent Deficiencies Act, because issuing the certificate was not "a part of the Commission's delegated power to regulate commerce, and (was) is not an incident of such regulation." Undoubtedly the corollary is equally true and an order made by the Commission as a part of its delegated power to regulate commerce, and as an incident of such power is within the scope of the remedy. The Texas & Pacific case holds that whenever an application is made to the Commission by a carrier for a certificate of public convenience and necessity, "the Commission may pass incidentally upon the question" of its authority in the premises. It is, of course, authorized to pass on this question as a part of its delegated power to regulate commerce, and as an incident of such power.

The order affirmatively determining the character and status of the mileage in question would, we assume, in view of the decision in the Texas & Pacific case, be given binding effect in any future suit or proceeding involving the right of the Railway Company to construct the mileage, unless set aside or annulled. (See *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 469, 470; *Interstate Commerce Commission* v. *Union P. R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S., 88; *Manufacturers R. Co.* v. *U. S.*, 246 U. S., 457, 489). Therefore, the remedy provided by the Urgent Deficiencies Act must be available to review the legality of the order, because otherwise the rights of the Railway Company might be prejudiced.

Statement of Case

Piedmont and Northern Railway Company, a corporation organized under a Special Act of the Legislature of South Carolina (R. 210 and 217), and engaged as a common carrier in the transportation of persons and property in interstate commerce, owns and operates a line of electric railway in South Carolina, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch from Belton to Anderson of 11.3 miles; and also a line of electric railway in North Carolina extending from Gastonia to Charlotte, a distance of 23.5 miles, with a branch to Belmont of 3.2 miles, making in all 127.9 miles. (R. 222). In the early part of 1927, the corporation was about to begin the construction of additional lines, 128 miles in length, to be operated in conjunction with the existing lines, and consisting of a line about 53 miles in length, running from Spartanburg, South Carolina, to Gastonia, North Carolina, which would connect the existing lines, and also a line 75 miles in length extending from Charlotte in a northeasterly direction to Winston-Salem,

in the latter state, so as to constitute, together with the existing lines, a continuous line of railway, extending in a northerly direction from Greenwood, South Carolina, to Winston-Salem, North Carolina, which, with the two branches above referred to, would have a total mileage of approximately 256 miles. (R. 222).

The Company was proceeding upon the assumption that the lines were "interurban electric railway," and that therefore it was not necessary to apply to the Commission for a certificate of public convenience and necessity authorizing their construction. (R. 142).

The project, however, came to the attention of the Commission, and it notified the Company's President by letter of March 8, 1927, "that before the Piedmont and Northern constructs any extensions to its lines or issues any securities, it will be expected to file appropriate applications for authority therefor under Secs. 1 and 20a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention. In this connection, I desire to call your attention to the opinion of the Supreme Court of the United States in *Texas & Pacific Railway* vs. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266." (R. 113).

On March 26th, 1927, the Company did file the required application for a certificate of public convenience and necessity, if deemed to be necessary. (R. 11). The question of the Commission's authority in the premises, because of the alleged interurban character of the lines, was duly raised and reserved both in the application itself (R. 17), and by motion to dismiss the application for lack of authority in the Commission to issue the certificate. (R. 28).

After extensive hearings, the Commission, on April 3rd,

1928, issued its report, in which it first determined that the authority conferred upon it by paragraph (18) did extend to the construction of the new lines, and further determined that they were not required in the interest of public convenience and necessity. (R. 29).

The appellant Company filed its petition in the court below on May 22nd, 1928, (R. 1). A court of three Judges was organized under the Act of October 22nd, 1913, (Ch. 32, 38 Stat. 222; U. S. C. Tit. 28, Sec. 47). The National Association of Railroad & Utility Commissioners was allowed to intervene in support of the petition (R. 112), while the Interstate Commerce Commission and the Southern Railway Company and other steam railroads, who had opposed the application before the Commission, were allowed to intervene in opposition to the petition and in support of the Commission's authority.

Upon the hearing in the court below, appellant Company put in evidence the letter of March 8, 1927, heretofore referred to, (R. 112); and also the record made in the proceedings before the Commission, consisting of the evidence before the Commission upon which the order complained of was based, including all exhibits introduced before the Commission and the Company's returns to the Commission's questionnaire. (R. 114).

The narrative of the evidence incorporated in the record before this court omits so much of the record before the Commission as relates exclusively to the issue of convenience and necessity; but, as stipulated and agreed upon by counsel (R. 209), and as approved by the court below (R. 210), it "contains all of the evidence introduced before the court (below) **** which is in any way material to the issues and questions as to the jurisdiction and authority of the Interstate Commerce Commission involved" upon this appeal. (R. 209, 114).

The material facts, as established by the evidence before the Commission, are not in dispute and are fully, fairly and accurately stated in the opinion of the court below; except in a few particulars, which the court overlooked or did not deem sufficiently material to be stated, but to which we shall call attention in the argument here made.

The court first disposed of the contention, made on behalf of the Government, that appellant's Railway is operated as a part of "*a* general steam railroad system of transportation," because it is operated as a part of *the* general transportation system of the United States, in that it interchanges freight and participates in through routes with steam railroads.

It said:

> "It is obviously electric, and there can be little doubt that it is not operated as part of 'a general steam railway system.' The operation of the road, it is admitted, is entirely in the hands of the Piedmont and Northern Railway Company, independent of any other railroad corporation; and it is not a part of any other system of transportation unless that phase is taken in a broad sense to mean the whole aggregation or net work of railways of the United States which are physically connected for the interchange of business. In this sense the petitioner is a part of a railroad system, since, as will presently appear, it has physical connections and through traffic arrangements with steam roads which give it access to all parts of the country." (R. 230).

Then, after reviewing the various statutory provisions in which the term "railway system" has been used by Congress sometimes in a general and sometimes in a restricted sense, and the authorities construing these provisions, the court continued and concluded:

"Section 422, 41 Stat. 488, adding Section 15a to the Interstate Commerce Act, confers upon the Commission the power to prescribe just and reasonable rates for railroad carriers and contains the so-called recapture provision by which the excess income of railroads is returned to the United States. Paragraph 6 provides that 'the value of railway property and the net railway operating income of a group of carriers which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system.' The Interstate Commerce Commission applied this section in Excess Income of St. Louis & O'Fallon Ry. Co., 124 I. C. C. 3, 11, and held that in the absence of any contrary indication, it must be assumed that Congress had in mind the usual meaning of the word system as applied to railroads, implying an operating relationship and unity and involving (1) common control, (2) common management and (3) operation as a system. A similar construction was given by the Commission to the same term in Paragraph 22 of Section 1 of the Act now under consideration, in the cases of the Michigan United Rys. Co. 67 I. C. C. 452, and Sacramento Northern Ry. 71 I. C. C. 653. These rulings in our opinion were correct. They are borne out by the phraseology of the excepting clause in Section 15a wherein Congress excluded from the authority of the Commission 'interurban electric railways, unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight.' If the broad significance for which petitioner contends should be given to the first clause in this alternative, there would be no need for the second, for it is a matter of common knowledge that physical connections are established between the two kinds of railway to enable the interurban to engage the more readily in the general transportation of freight." (R. 232).

"We conclude that the Piedmont and Northern is

not a part of a general steam system of transportation, within the meaning of Paragraph 22, Section 1." (R. 233).

The court stated that the inquiry was thus "reduced to the single question whether the Piedmont and Northern is an interurban railway." (R. 230).

The opinion gives, in part, the history of the organization of the Company and the development of its railway as follows:

"As early as 1910, a group of men, headed by the late James B. Duke and William S. Lee, now President of the Piedmont and Northern, having realized the possibility of a great industrial development in this section (the Piedmont section of North and South Carolina), in connection with the use of hydroelectric power, formulated a project to build a high speed electric railroad to connect with the street railway system in the cities en route. The plan was announced to the public in 1910, and various steps were taken to carry it into effect. Thus the Piedmont Traction Company was incorporated on January 6, 1910, *under the general laws of North Carolina, to operate street railways by electricity or other power,* extending not more than 50 miles from Gastonia. It constructed and later conveyed to the petitioner its present line between Gastonia and Charlotte. On March 10, 1910, the Greenville, Spartanburg, and Anderson Railway Company was incorporated, with like provision as to motive power, *under the general laws of South Carolina.* It acquired *an interurban electric railway* between Belton and Anderson, constructed a line between Greenwood and Greenville, and later conveyed both to the petitioner.

"On January 10, 1911, J. B. Duke, W. S. Lee and other interested persons, as managers, entered into an agreement called the 'Piedmont Syndicate' with certain subscribers to acquire, by purchase or construction, a system of railways to carry passengers

and freight in the several counties in North and South Carolina, through which the present and proposed lines of the petitioner run. Stock was offered to the public, and it was explained that it was proposed to build such a line and that the Syndicate was formed to buy certain lines already built which would be suitable to carry out the project. Large powers were conferred upon the managers, with discretion to determine from time to time whether it was for the interest of the Syndicate to proceed with the project or abandon it.

"The Piedmont and Northern Railway Company was incorporated by special act of the General Assembly of South Carolina, approved February 24, 1911, with a capital stock of $5,000,000, with power to construct and operate a line or lines of railway, to be operated by electricity or other motive power. ***** Power was given to construct, acquire and operate street railways run by electricity or other motive power. The consolidation of the new company with the Greenville, Spartanburg and Anderson Railway Company and with any other railway company chartered in any State through or near which the Piedmont and Northern proposed to pass, was expressly authorized.

* * * * *

"The actual construction of the present lines took place between 1912 and 1914. The line from Gastonia to Charlotte was completed in July, 1912; that from Greenwood to Greenville in November, 1913, and that from Greenville to Spartanburg in April, 1914." (R. 225, 226, 227).

Then saying that, in order to escape the Commission's authority, petitioner must show "it is *an interurban railroad, a matter which can only be determined by a consideration of the matter of its construction and equipment and the business which it conducts.*"(1) the court continued;

(1) All italics are ours except where otherwise indicated.

"The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby its passenger cars within the cities enroute become street railway facilities. Between the cities there are frequent stops for passengers at an average distance of 1.2 miles apart—that is to say, 106 stops in 128 miles of road. 49 passenger trains daily traverse various parts of the line. There are more daily trains and more frequent stops than on the corresponding mileage of the Southern Railway. Furthermore the spacing between the trains is more uniform. The passenger cars are motivated by self-contained motor units, and are lighted from a trolley. By reason of their equipment, they are not (un) acceptable upon steam lines.

"The use of city streets for the collection and delivery of freight is a peculiar characteristic of the Piedmont and Northern and other interurban roads. Its electric locomotives and cars are constructed to take the sharp curves and steep grades peculiar to the city streets. It is even possible for electric locomotives to go inside a building where a steam locomotive cannot go. *The switching service thus made available in the cities is extremely convenient for industries of all sorts, including factories, wholesale houses and even retail houses. The street railway lines are used largely for delivery and pick up service;* but the bulk of the through traffic does not move over the city streets.

"Local freight service between cities on the petitioner's lines is also more flexible and convenient than that rendered by the steam railways. There are more daily freight trains in small units. 18 trains which average 14 loaded and 6 empty cars, are operated daily. There are more frequent stops on the Piedmont and Northern than on the Southern in local station to station movement of freight. In addition, there are local switches for industrial plants, so that *freight is delivered and picked up all over the line.* In

the delivery of less than car load freight in short distances up to sixty miles, there is more expedition and greater dispatch than in the handling of similar business on the Southern. The electric locomotives for the movement of freight are of somewhat lighter character than those employed on the steam roads and are unfit for long haul heavy load traffic such as that hauled by the electric locomotives on the Virginian railway. The cars and locomotives are so equipped that they can be used either upon a voltage of 1500 d. c. between the cities or 600 d. c. inside the cities." (R. 233, 234).

"The difference between the local freight service of the Piedmont and Northern and that of the steam railroads consists chiefly in the use of the street railway systems to gather up and deliver freight in the cities, the greater number of local freight stations on its lines between cities, the operation of its freight trains in smaller units and with greater frequency, and of a speedier delivery of local freight between nearby points.

"The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines in the south through which it is connected for the receipt and delivery of property with vast sections of the United States. Upon this phase of its activities, the Commission, in its opinion, and the opponents of the petitioner in this case depend to show that the road is not merely an interurban electric railway, but something far more important in the business of transportation. In the nature of things, its extra-interurban operations consist of freight movements. This is so because the great bulk of its passenger traffic is local and is carried in cars which cannot be used on steam roads; while its freight cars

can be and are freely interchanged with connecting steam railroads.

"The road bed, rolling stock and equipment are of such a character that it is well suited to co-operate with steam railroads in the transmission of freight to distant points. Freight trains of 45 cars, using 2 locomotives, are not unusual; the average train is 20 cars. Most of the freight traffic is handled in cars owned by steam railroads but the petitioner owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam railway type and move freely on foreign roads. Altogether, there are 337 cars. The construction is that of a standard steam railway. Expensive grading was undertaken; and grades and curves are suitable for heavy traffic. Rails are of 80 lb. section. Bridges were made as strong as those on the Southern Railway, and the locomotives purchased were heavier than was necessary for merely local traffic. The purpose of the builders from the beginning was to construct a line of railroad which would aid in the industrial development of the Piedmont region and serve as a means by which mills and factories could find connections with the steam railroads of the country for the delivery of freight. Points of contact with carriers extending to outside territory have been obtained in as large a number as possible. Traffic agreements have been made with the Seaboard Air Line, the Southern Railway and other roads with reference to rates and the division of revenue received in the interchange of traffic. While street railways have been used for local deliveries, the through freight does not pass through the cities, but is carried over additional lines which run around the cities and avoid the city streets."

"The business methods of the road are similar in many respects to those of steam railroads. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Express Company. It is a member of the American Railway Association, the Southern Freight

Association and other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every tariff bureau of the United States and has 502 published tariffs. It follows the methods of steam roads in matters of rate divisions, interline billing, claim settlements and in all of its relations with shippers and consignees. It publishes a tariff directory which is on file with the Interstate Commerce Commission. It has a general agent in New York, a commercial agent at Atlanta and at all of its connecting points.

"The entire territory east of the Mississippi is tributary to the road in that freight originating on and destined to it is derived from or moves to every part of that section of the United States. While the matter had not been studied in retail, the evidence tended to show that the road also sends freight beyond the Mississippi to the Pacific coast and to New England.

"The distribution of operating revenues very clearly tells the story. Petitioner's witnesses, speaking in round figures, state that 92% of the revenue is derived from freight and only 8% from passenger traffic. The detailed figures for 1926 show even a greater disparity. (Given in footnote, p. 237). The contrast between the revenues from local business and that from business interchanged with steam roads in 1926 is equally striking. While 97.63% of the passenger revenue was derived from local traffic, and only 2.37% from interchange, the reverse is true with revenues from freight of which only 4.75% came from local station to station movement and 95.25% from traffic handled jointly with steam roads. Of 72,886 loaded cars handled, 68,370 were interchanged, most of them in interstate movement, reaching all parts of the United States.

"*The proposed extensions would not alter the character of the petitioner's business.* There would be the same local service in the transportation of passengers and freight since the railway would connect

with street railways of the cities enroute. At the same time the interchange of freight business with steam railroads would be greatly increased. Indeed if the road should be completed so as to form a continuous interstate line in North and South Carolina, it would constitute the interior connecting link in a new joint through route and in effect, a new trunk line will be formed in addition to those now provided by the systems of the Southern, the Seaboard and the Atlantic Coast Line; for the Piedmont and Northern would then connect with the Georgia and Florida at Greenwood, South Carolina, on the south, and with the Norfolk & Western at Winston-Salem, North Carolina, on the north. Numerous new connections with steam roads would then be made and many new points in distant sections of the country would become accessible; and the railway would become to an increased extent an integral part of the great interstate railway system of the country.

"The amount and character of the new business which would be done in the first year of the construction of the extensions has been estimated by officials of the petitioner as follows:

Freight	$3,597,384.00
Passenger	196,502.15
Express	70,260.76
Miscellaneous	25,869.66
	$3,890,016.57

During the succeeding five years, an increase each year of 8.4% over the preceding year would be expected.

"It will be observed that the existing predominance of freight over passenger revenues would continue. It is estimated that the freight traffic would have its origin in the following manner:

Local traffic having origin and destination on the Railway's lines 21%

Traffic originating beyond and destined to the Railway 44%

Traffic originating on the Railway and destined to points beyond 20%

Overhead or bridge traffic 15%

"The proportion of bridge traffic estimated shows that it would be still of minor importance as compared with the traffic which originates on or is destined to points on the Railway. The opposite is true of the Southern Railway in the Piedmont District." (R. 234-239).

Upon the foregoing facts, after discussing the Acts of Congress dealing with electric railways and many of the authorities, the court said, among other things, that "Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and *should be engaged in the local carriage of passengers and freight, as its primary business,* the extension of its line would remain a matter of local concern and should be left to the regulation of local authority"; that while "it is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute, ** there is no difficulty in the case at bar in determining that the Piedmont and Northern has ceased to be primarily an interurban railroad." (R. 246-247). It concluded that the Company's "freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of the Commission; (that) even

if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent," (R. 251), and therefore upheld the Commission's authority in the premises and entered the final decree denying the relief prayed by petitioner and dismissing the petition. (R. 252).

Specification of Assigned Errors Intended to be Urged

Appellant will here urge Errors III, IV and V, as set forth in the assignments of error (R. 258-259), and as summarized under Point 1 (a) and (c) in the Statement of Points to be relied upon by appellants (R. 268-269).

These errors and points raise the question heretofore stated, whether or not, upon the facts established, the proposed lines were to be constructed as parts of an interurban electric railway, which is not operated as a part of a general steam railroad system of transportation, and were therefore by paragraph (22) of Sec. 1 of the Interstate Commerce Act exempt from the authority conferred on the Commission by paragraph (18).

SUMMARY OF ARGUMENT

I.

Paragraph (22), Sec. 1, of the Interstate Commerce Act, as amended by the Transportation Act, 1920, provides that the authority of the Commission conferred by paragraphs (18) to (21) inclusive shall not extend to the construction or abandonment of street, suburban or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

II.

The Piedmont and Northern Railway is operated only by electricity, and there is no relationship between it and any steam railroad system of transportation except that it interchanges freight and participates in through routes with several steam railroads.

III.

Congress did not intend the word "interurban" to limit the scope of the words "interurban electric railways" to a class of carriers which are primarily engaged in the local carriage of passengers and freight, and whose interstate operations are, by the hypothesis of the classification, necessarily restricted and limited in extent as compared with the ordinary steam railroad; but on the contrary used the word "interurban" to describe that type of electric railways whose operations are *not* local and limited in extent as compared with street and suburban electric railways; for

(1) Congress in the Transportation Act, 1920, dealt with interurban electric railways as interstate carriers.

(2) In Sec. 15a Congress made provision for "interurban electric railways . . . engaged in the general transportation of freight," and included them among the carriers "put under the fostering guardianship and control of the Commission," "in order to provide the people of the United States with adequate transportation" instead of including them along with "(a) Sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam rail road system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility,

owned exclusively and maintained, operated and controlled by any State or political sub-division thereof," which were excluded from the provisions of Sec. 15a.

(3) In Secs. 204 and 209 of the Transportation Act, 1920, Congress gave authoritative recognition to the fact that interurban electric railways may draw the greater part of their operating revenues from freight traffic.

(4) In Sec. 15 (3) of the Interstate Commerce Act, Congress brought forward the provisions of the Act of June 18, 1910, which authorizes the Commission to establish through routes, classifications, practices, rates, fares and charges between electric railways engaged in the general business of transporting freight and railroads of a different class.

(5) Acts of Congress prior to the Transportation Act, 1920, decisions of the courts, and rulings of the Commission in which electric railways were grouped under the three general heads of street or urban, suburban, and interurban electric railways, in differentiating them from steam railroads, give rise to the presumption that Congress in adopting the same nomenclature and in following the same grouping in the Transportation Act, 1920, intended to make the same differentiation.

IV.

The fact that the greater part of the traffic of an interurban electric railway comes from the general transportation of interstate freight, and that most of its traffic is interchanged with steam railroads, does not under the provisions of the Interstate Commerce Act, as amended by the Transportation Act, 1920, warrant its being placed in the same category as a general steam railroad so as to deprive it of the exemption given to interurban electric railways not operated as a part or parts of a general steam railroad system of transportation by paragraph (22), Sec. 1; for

(1) Passenger traffic and the local carriage of freight and passengers are not a distinctive service of all interurban electric railways, especially in view of the fact that they are regulated and controlled by Congress as carriers engaged in the interstate transportation of passengers and freight; any more than freight traffic and the interstate carriage of passengers and freight are a distinctive service of all steam railroads.

(2) Congress intended the exemption of interurban electric railways given in paragraph (22) to depend upon whether they are operated as a part or parts of a general steam railroad system of transportation, instead of upon whether they are engaged in the general transportation of freight; for

(a) The fact that the exception in Sec. 15a covers interurban electric railways engaged in the general transportation of freight, or operated as a part of a general steam railroad system of transportation, while the exception to the exemption given by paragraph (22) only covers those operated as a part of a general steam railroad system of transportation, shows that Congress did not intend that an interurban electric railway should be denied the exemption on the ground that it is engaged in the general transportation of freight.

(b) If the test of the exemption which the statute prescribes should be disregarded and the right to the exemption should be made to depend upon the amount and extent of the freight business of the railway claiming exemption, the status of many electric railways will be rendered obscure and uncertain, contrary to the intention with which Congress should be presumed to have acted in view of the severe penalties imposed for the construction or abandonment of a line of railway, or for the issuance of securities without the authority and approval of the Commission by a carrier other than an interurban

electric railway which is not operated as a part or parts of a general steam railroad system of transportation.

V.

The Piedmont and Northern Railway Company's claim to the exemption given by paragraph (22), Sec. 1, of the Interstate Commerce Act, as amended by the Transportation Act, 1920, is supported by the decision of the court in *United States* v. *Village of Hubbard,* 266 U. S. 474.

VI.

The decree below denying the Piedmont and Northern Railway Company the exemption which it claims under paragraph (22) of Sec. 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, cannot be sustained under the principles and rules of interpretation approved in *Texas & P. R. Co.* v. *Gulf C. & S. F. R. Co.,* 270 U. S. 266.

VII.

The Piedmont and Northern Railway has been organized, developed and constructed, and has always been operated, and until March 8, 1927, when the Commission directed that it apply for a certificate authorizing the construction of the mileage in question, had always been officially treated and dealt with by the Commission, the U. S. Railroad Administration, and the U. S. Labor Board, as an interurban electric railway; and even if the word "interurban" should be interpreted as a word of qualification restricting the scope of the words in question the Piedmont and Northern Railway must be differentiated from the ordinary steam railroad and classified as an interurban electric railway on account of its distinctive methods of operation and manner of service, consisting principally in the use of city streets and street railway systems to gather up and distribute freight in cities, the pick up and delivery of freight and switching all along its line, and the frequent operation of trains in small units.

VIII.

The fact that Congress in the Railway Labor Act of May 20, 1926, (44 Stat. 577), re-enacted and brought forward from Title III, Section 300, Paragraph (1), Transportation Act, 1920, the words in question which had been interpreted by the U. S. Labor Board to include the Piedmont and Northern within the scope of their meaning, gives rise to a strong presumption that the interpretation was in accord with the original intention with which Congress used the words in the Transportation Act, 1920.

ARGUMENT

I

The Distinctive Characteristics of Petitioner's Railway Differentiate it From Steam Carriers and Determine its Classification as "An Interurban Electric Railway," Even if the Word "Interurban" Be Interpreted as a Word of Qualification Restricting the Scope of the Words in Question.

Transportation Act, (February 28), 1920, Chap. 91, Sec. 402, 41 Stat. at L., 456, 477, 478, (U. S. C. A. Tit. 49, Sec. 1, paras. 18 & 22), provides (para. 18): ". . . no carrier by railroad subject to this Act shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such extended line . . ." Paragraph (22): "The authority of the commission (so) conferred . . . shall not extend to the construction . . . of street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The opinion of the court below disposes of the contention that because petitioner's railway interchanges freight and participates in through routes with steam railroads, and to that extent is a part of *the* general transportation

system of the United States, it is operated as a part of "a general steam railroad system of transportation"; so that the single inquiry is whether it is an interurban electric railway. In asmuch as the proposed extensions will not alter the character of petitioner's business (R. 237), we shall, except as otherwise indicated, refer to the railway as including both the existing and proposed lines, and for convenience shall refer to appellant, Piedmont and Northern Railway Company, as petitioner.

No definition of "an interurban electric railway" is given in the Transportation Act or in any other Act of Congress dealing with such carriers, and the question is what scope is to be given to those words.

Congress in the Transportation Act, 1920, dealt with interurban electric railways as interstate carriers, which were engaged, or might engage in the general transportation of freight, (Sec. 421; U. S. C., Tit. 49, Sec. 15a), which might draw the major part of their operating revenue from freight traffic or from other sources (Secs. 204, 209); and which did or might interchange traffic and participate with steam railroads in interstate joint through routes. (U. S. C., Tit. 49, Sec. 15 (3)). Congress therefore intended to regulate, and to include within the scope of the words in question, interurban electric railways as carriers of interstate freight and passengers. The word "interurban" was *not* used to designate a road whose operations are limited in extent and primarily local as compared with steam railroads, but on the contrary was used to designate that type of electric railway whose operations are *not* local and limited in extent as compared with street and suburban electric railways. (See *United States* v. *Village of Hubbard,* 266 U. S. 474, 478; *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission,* 230 U. S. 324, 337). Congress adopted the nomenclature commonly applied to electric railways, and in grouping

them under the usual three general heads, used the word "interurban" as the superlative of the three words "street, suburban and interurban."

We shall later on undertake to demonstrate the truth of the foregoing propositions, but for the present we merely state them, as the first point we wish to make is that if Congress intended by the use of the word "interurban" to distinguish interurban electric railways from other general carriers engaged in interstate commerce, the manner of petitioner's service and its methods of operation are such as to control and determine its classification as an interurban electric railway, and that, possessing these distinguishing characteristics, petitioner's railway cannot be excluded from the scope of the words in question and denied the exemption which the statute gives to carriers within their scope, merely because it possesses other characteristics and performs functions common to all carriers by rail, including, of course, steam carriers. Classification, where required, must be predicated upon distinctive rather than common characteristics.

(1) The history of petitioner's organization and development cannot be disregarded; and we submit that this history shows that petitioner was organized and has been developed, operated and officially treated and dealt with as an interurban electric railway, and as such it proposes to construct and operate the extensions in question. Surely there can be no suggestion that its claim to such descriptive name is now put forth as a subterfuge to escape the authority conferred upon the commission by paragraph (18) of Section 1. The first line acquired, by the originators of the project, was an *interurban electric railway* from Belton to Anderson, South Carolina, a distance of about 10½ miles; the street railway systems in the cities to be connected were either acquired or trackage rights secured over them (R. 117); the present North Carolina mileage

was constructed by a street railway corporation organized under the general laws of the state of North Carolina; the South Carolina mileage between Greenwood and Greenville was constructed by the Greenville, Spartanburg & Anderson Railway Company, organized under the general laws of that state. (R. 121). The Piedmont Syndicate, which was formed for the purpose of carrying out the plan of constructing an electric interurban railway through the Piedmont Section of the two states, provided for the acquisition by purchase or construction of a number of connecting or separate lines of railway for the transportation of passengers and *to the extent permitted by law of freight* in the several counties named in the syndicate agreement. (R. 121, 122). The Piedmont and Northern Railway Company itself was incorporated by Special Act of the General Assembly of South Carolina, approved February 24, 1911. While under its charter it is given broad powers, including the right to use electricity or other motive power, and to acquire by purchase or construction, either directly or through subsidiaries, and to operate lines of railroad and railway as well as street railways (R. 122), it has never used any motive power except electricity, has never acquired any line of railway except those constructed by the Piedmont Traction Company and the Greenville, Spartanburg & Anderson Railway Company, and the interurban electric line between Belton and Anderson, nor has it, itself, ever constructed any line of railway except the existing line in South Carolina from Greenville to Spartanburg. (R. 122, 133). It proposes to construct and operate the extensions in the same manner in which the existing mileage was constructed and is operated, connecting the extensions with the street railways of the cities en route, just as the existing mileage is connected with the cities it serves. (R. 117, 120, 237).

Although the court held that the entire project, includ-

ing the construction of the proposed extensions, had not been definitely undertaken prior to the effective date of paragraph (18) of Sec. 1, and the contention to the contrary has been abandoned in view of the decision below, it is conceded that "the evidence . . . shows clearly that the plan for a continuous line of electric railway through the Piedmont section of North and South Carolina from Greenwood and Anderson on the South to Durham and Winston-Salem on the North was conceived long before the year 1920" (R. 225). The court also called attention to other admitted facts plainly showing "an early intention to build the continuous line" (R. 227), thus making it manifest that petitioner's claim of the right to construct the proposed extension under the exemption conferred by paragraph (22) of section 1 is put forth in entire good faith.

(2) The construction and equipment of an interurban electric railway interchanging freight and participating in through routes with steam carriers, as such a railway may do under the Act, must necessarily largely be of standard type; but, in so far as there is any inherent difference, petitioner's construction and equipment are of the standard interurban type. Its lines tie in with the street railway systems; it owns and operates the street railway system in the City of Gastonia and has trackage rights over approximately 12 miles of street railway tracks in the Cities of Charlotte and Greenville (R. 140, 207); its passenger cars and freight locomotives are designed to operate over a high degree of track curvature as in cities, and are operated by self-contained motor units to which power is supplied by overhead trolley; a 1500 d. c. voltage is used between cities and a switch arrangement provided so that in cities the voltage may be reduced to 600 volts, ordinarily used on street railways; freight traffic is hauled by electric locomotives designed to serve local conditions and unfit for

a line with a long haul and heavy load traffic; only its box cars and automobile cars are suitable for interchange with steam lines. (R. 138, 139).

(3) Petitioner's methods of operation and manner of service are distinctive from those of the ordinary steam railroad. This is conceded as to its passenger traffic. As to the freight traffic, city streets are used for the collection and delivery of freight, except that lines are provided around the cities for the movement of such through freight as does not need to go over the city streets; outside the cities freight is delivered and picked up and a switching service performed all along the line; freight trains are run in small units, more frequently, and the stops are closer together than is customary on steam railroads; local switches are maintained for industrial plants all over the line; and electric locomotives and cars are operated around sharp curves and over steep grades, it being possible for an electric locomotive to go even inside a building where a steam locomotive could not go. (R. 121, 140, 151).

This method of operation is followed and this service is rendered both in the handling of local freight, having both origin and destination on petitioner's lines, and in the receipt and delivery of interstate or through freight having either origin or destination on its lines. There would be no reason for making any distinction between the two classes of freight, and none is made. (R. 142, 238, 239).

Petitioner's Traffic Manager testified upon cross-examination (R. 153):

> "Interstate freight as we handle it is local in character, in that the service performed at the delivery and the initial points is purely local. To us we do not distinguish between the handling of interstate and intrastate traffic for the reason that it is a purely local

> traffic with us, whether it goes off our line a short distance or whether it stays on the line. Therefore, the distinction as to interstate traffic would not apply in the same way to the Piedmont and Northern as it would to longer lines. The reason I say that a large part of our traffic is local is because of the comparatively restricted scope of the length of our line."

And its President said that petitioner's railway was such that it could "gather up traffic from the various industries and handle it to the trunk lines and thereby reach the through business as well as serve the local business." (R. 121).

There was no contradiction of this evidence, but on the contrary the protesting steam railroads undertook to show that they too render the same sort of service, yet, as the court finds, failed to show it. (R. 234, 235). If they had shown it, obviously the showing would not have had the effect of changing the character of petitioner's railway, but at most of merely adding to the characteristics of those of protestants.

The difference between the freight service of petitioner's railway and that of the ordinary steam carrier is further indicated by two facts to which the court below did not call attention.

First, the less-than-carload business of petitioner is, in tonnage, approximately *20%* of its total business (R. 156); whereas for the United States as a whole such business is *2.79%* of the total tonnage; for the southern region *3.84%*; for the entire southern district *3.08%*; for the New England region *6.74%*; for the entire eastern district *2.73%* (R. 163); and the Vice-President of the Southern Railway Company in charge of traffic gave "the purely local less-than-carload traffic in the territory (in question) as being under 1%." (R. 172).

Second, the mean length of haul of freight traffic on the Piedmont and Northern is 28.8 miles, while the average haul on the Southern for the year 1926 was 187.43 miles; the earnings per car to the Southern on traffic in and out of the territory in question being $126.16 and to the Piedmont and Northern $43. and odd cents. (R. 169). The figures for the Piedmont and Northern were given by the Assistant to the President of the Southern Railway Company in estimating the loss which his company would sustain by the construction of the additional lines, and, as we understand, are estimates of petitioner's average haul and earnings per car with the proposed extensions in operation.

(4) Petitioner has been officially treated and dealt with as an interurban electric railway, at all times until the receipt of the Commission's letter of March 8, 1927, (R. 112). It has been required to file with the Commission reports of its finances and operations under the accounting rules governing electric railways (R. 143); see *U. S.* v. *Village of Hubbard*, 266 U. S., 474, 477); it was taken over by the government under the proviso contained in the seventh paragraph of Sec. 1 of the Federal Control Act of March 21, 1918, (40 Stat. L., 451), including within "Federal control" interurban electric railways whose principal source of operating revenue was freight traffic; it was included in the "list of properties in Federal control as of January 1, 1919, including steam roads, switching and terminal companies, electric roads, steamship lines, ferry lines and water carriers, canal and inland waterways, pullman car lines," and in such list was set out under the heading "Electric Lines Operated," (see letter of October 1, 1919, from Walker Hines, Director General, to Hon. J. J. Esch, Chairman House Committee, Interstate and Foreign Commerce, U. S. House Hearings, 66th Congress, 1st Session, Vol. 15, p. 2796). It was included in the

"Memorandum Concerning Electric Railway Companies Reporting to the Interstate Commerce Commission for the Calendar Year 1917," referred to in the 5th foot-note of the opinion *U. S.* v. *Village of Hubbard*, 266 U. S. 474, 478. The Commission on October 12, 1920, ruled informally that it was an interurban electric railway not operated as a part of a general steam railroad system of transportation, and therefore within the exception contained in Sec. 20a exempting such railways from the authority of the Commission over the issuance of carrier securities (R. 143); and on December 11, 1920, the United States Railroad Labor Board (Decision No. 33, Docket 26-a), ruled that for the same reason it was not subject to the jurisdiction of the Labor Board.

(5) The statement that "the *business* methods of the road are similar in many respects to those of steam railroads" (R. 236), surely furnishes no justification for classifying petitioner with steam railroads. Under the Act an interurban electric railway may, and petitioner does, do business with steam railroads, interchanging freight and participating in through routes with them. It can not do this, without adopting "business methods . . . similar in many respects to those of steam railroads." The law requires that it be named in the tariffs under which it participates, and also prescribes the methods to be followed "in matters of rate divisions, interline billing, claim settlements and in all . . . relations with shippers and consignees." While membership in traffic organizations, largely composed of steam carriers, is not legally obligatory, it is a practical necessity, and is customary in the case of electric interurbans engaged in the general transportation of freight. (See *Michigan R. R. Co.* v. *P. M. R. R. Co.*, 74 I. C. C., 496, 497, 498).

(6) While the opinion states, "The proposed extensions would not alter the character of petitioner's business.

There would be the same local service in the transportation of passengers and freight since the railway would connect with street railways of the cities en route"; yet it is urged:

> "At the same time the interchange of freight business with steam railroads would be greatly increased. Indeed if the road should be completed so as to form a continuous interstate line in North and South Carolina, it would constitute the interior connecting link in a new joint through route and in effect, a new trunk line will be formed in addition to those now provided by the systems of the Southern, the Seaboard and the Atlantic Coast Line; for the Piedmont and Northern would then connect with the Georgia and Florida at Greenwood, South Carolina, on the south, and with the Norfolk & Western at Winston-Salem, North Carolina, on the north. Numerous new connections with steam roads would then be made and many new points in distant sections of the country would become accessible; and the railway would become to an increased extent an integral part of the great interstate railway system of the country."(R. 237,238)

(a) It cannot be a ground of objection that the road as completed would "form a continuous *interstate* line in North and South Carolina," or that it "would become to an increased extent an integral part of the great *interstate* railway system of the country." Congress has no control, and can confer upon the Commission no authority, over any interurban electric railway, except one which does "form a continuous interstate line," or whose operations include or directly affect interstate commerce. (See *Texas & N. O. R. Co.* v. *Northside Belt R. Co.,* 236 U. S., 475, 72 L. ed. 661). For purely local or intrastate construction and operation no exemption is needed.

(b) Neither can it be urged as a valid objection that the road as completed would constitute a connecting link, interior or otherwise, in a new joint through route; or that the interchange of freight business with steam railroads

would be greatly increased, and the new connections make accessible to freight originating on petitioner's lines many new points in distant sections of the country. The provisions of the Interstate Commerce Act, as amended by the Transportation Act, 1920, governing the operations of interurban electric railways permit them to increase and expand their freight business by forming connections and interchanging freight with steam railroads, and participating with them in joint through routes. Of course, this applies to the interchange of interstate freight and to joint through routes of interstate movements, thereby necessarily making accessible to interurban electric railways, points in distant sections of the country reached by the lines of their connections. Furthermore should the road be completed matters of the through routes in which it may participate, and of divisions of joint rates between it and its connections, would, under Sec. 15, paras. (1, 3 and 6), and other provisions of the Act, be subject to the regulation and control of the Commission.

(c) It is admitted that "the proposed extensions would not alter the character of petitioner's business"; that while the bridge traffic would be somewhat increased from the present proportion of approximately 2% of petitioner's total business (R. 142), "the proportion of bridge traffic (as) estimated (for the completed road) shows that it would still be of minor importance as compared with the traffic which originates on or is destined to points on the railway. The opposite is true of the Southern Railway in the Piedmont district." (R. 238)

II

Under the Transportation Act, 1920, An Interurban Electric Railway may Engage, as An Interstate Carrier, in the General Transportation of Freight, and Draw From This Source the Principal Part of its Operating Revenues, and May Interchange Freight and Participate in Through Routes With Steam Carriers Without Forfeiting the Exemption Which the Act Confers on Such Railways.

In *United States* v. *Village of Hubbard,* 266 U. S. 474, 69 L. ed. 389, it is said:

"The development of interurban roads became general about 1902. The authority to regulate them has been consistently exercised by the Commission in many cases and for many purposes. Since 1915, interurban electric roads have been required to file with it annual reports of their finances and operations. Jurisdiction over Urban Electric Lines, 33 Inters. Com. Rep. 536. In exercising authority over their passenger fares, *no distinction has been made between those interurban roads which were engaged in the general transportation of freight* in addition to their passenger or express business and those which were not. *On the other hand, the distinction* suggested in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission,* 230 U. S. 324, 337, 57 L. ed. 1501, 1506, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890, *between interurban railroads and urban or suburban street railways, has been carefully observed.* . . . . .

"The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of Congress, which, in recent amendments of the Act to Regulate Commerce, limited, in respect to certain subjects, the authority over them. The Commission entertained, in 1908, applications of interurban electric railroads to establish for freight through routes and joint rates with steam railroads. The Act of June 18, 1910, chap. 309, 36 Stat. at L. 539, 551, 552, Comp. Stat. para. 8583, 4 Fed. Stat. Anno. 2d ed. p. 469, provided that "the Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in . . . transporting freight in addition to their passenger and express business and railroads of a different character." Transportation Act, February 28, 1920, chap. 91, 41 Stat. at L. 456, Comp. Stat. para. 10,071¼, Fed. Stat. Anno. Supp. 1920, p. 72, enlarged, in several respects, the powers of the Commission, and dealt also

> in other ways with carriers engaged in interstate commerce. In doing so, it provided expressly, in five sections, *for the exclusion of certain electric railways* from the operation of the powers conferred; and *it also differentiated interurban electric railways* from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case. These provisions indicate that Congress did not intend to deny to the Commission the power to regulate interurban railways in other respects."

The provision of the Act of June 18, 1910, was brought forward, and with immaterial changes re-enacted as Sec. 15, para. 3, of the Transportation Act so as to read as follows:

> "The commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character."

Sec. 402 amending Sec. 1 of the Act to Regulate Commerce, and providing for the issuance of certificates of public convenience and necessity for the construction, extension or abandonment of lines, and conferring upon the Commission the authority to issue such certificates, by paragraph (22), excludes from the authority so conferred—

> "street, suburban, (and) or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Sec. 439 which inserts the new Sec. 20a of the Interstate Commerce Act, as amended by the Transportation Act, concerning the issue of securities, excludes by paragraph one—

"a street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation."

Sec. 300 dealing with the Railroad Labor Board, excludes by paragraph one—

"a street, interurban or suburban electric railway not operating as part of a general steam railroad system of transportation."

Sec. 204 relating to reimbursement of deficits of carriers incurred during Federal control, by paragraph (a) excludes—

"any street or interurban electric railway which has as its principal source of operating revenue, urban, suburban or interurban traffic, or sale of power, heat and light, or both."

Sec. 209 concerning the guaranty to carriers after the termination of Federal Control, excludes by paragraph (a)—

"a street or interurban electric railway not under Federal control on February 29, 1920, which has as its principal sources of operating revenue urban, suburban or interurban passenger traffic, or sale of power, heat and light, or both."

Sec. 422, introducing the new Sec. 15a dealing with the determination of a fair return, etc., excludes in paragraph one—

"(b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation, *or engaged in the general transportation of freight.*"

(1) The word used was *"general"*—the general transportation of freight; the interurbans regulated were *interstate.* Congress therefore intended to regulate "interurban electric railways" as (or certainly including those

engaged as), carriers of interstate freight, and as such to include them within the scope of the term in question, when not otherwise limited.

(2) Paragraph (3) Sec. 15 of the Interstate Commerce Act permits interurban electric railways to increase and expand their business in the general transportation of interstate freight by forming connections with steam carriers and participating with them in through routes and joint rates.

(3) Sec. 204 of the Transportation Act necessarily included within its provisions only those interurban electric railways, which, during any part of the period of Federal control, had as the principal source of their operating revenue freight traffic; and the same is true of Sec. 209 unless the interurban was under Federal control on February 29, 1920.

(4) Congress limited the exclusion of interurban electric railways from the sections of the Transportation Act dealing with the Labor Board, the issuance of railroad securities and certificates of public convenience and necessity, so as to except from exclusion and leave within the authority conferred by these sections *only those operated as a part of a general steam railroad system of transportation.*

In Sec. 15a dealing with the determination of a fair return, Congress attached to the exception used, in the sections just referred to, the additional limitation or exception "or engaged in the general transportation of freight," thus keeping within the provisions of Section 15a not only those operated as a part of a general steam railroad system of transportation, but also those engaged in the general transportation of freight.

Obviously Congress understood that unless the exclusion language of Sec. 15a was thus additionally limited

it would exclude interurbans engaged in the general transportation of freight; otherwise the additional limitation is meaningless.

It is equally obvious that Congress intended that the fact of an interurban electric railway being engaged in the general transportation of freight should not bring it under the authority of the Commission conferred by paragraph (18) of Sec. 1; otherwise it would have attached to the language of paragraph (22) excluding interurban electric railways the same exceptions or limitations which were attached to the same language of exclusion in Sec. 15a.

(5) If Congress thought it was necessary to incorporate in the exception in Sec. 15a interurbans engaged in the general transportation of freight, so as to keep them within the provisions of that section, and obviously it did think it necessary, then the failure to include such interurbans in the exception in paragraph (22) shows that Congress did not intend that interurban electric railways engaged in the general transportation of freight should be within the power given the Commission over new construction; but intended that they should be within the exemption given by that paragraph.

(6) Congress employed the terms, provisions and limitations contained in the Transportation Act, 1920, with an intelligent understanding of their meaning. In construing the Act all the provisions and limitations contained therein must, if possible, be given a meaning. The same terms and limitations, when used in different parts of the Act, must be given the same meaning, unless a contrary intention appears. *When a given term is used with a given limitation in one part of the Act and the same term is used without this limitation or with a different limitation in another part of the Act, it must be given effect in the latter*

part free of the omitted limitaion, or as differently limited.

(7) Surely when the same term is used in one part of the Act with two limitations and in another part with only one of these limitations, it must be given effect in the latter part subject to the one limitation only, and not also subject to the omitted limitation.

The foregoing statements are, we think, sustained by the *opinion* in *United States* v. *Village of Hubbard,* 266 U. S. 474, 69 L. ed. 389, and by the footnotes to the opinion, giving the history of development of interurban electric railways and the regulation of them by Congress and the Commission.

The decision of the United States Labor Board in the case of *Brotherhood Locomotive Engineers, et al.* v. *Spokane & Eastern Ry. & Power Co., et al,* Decision No. 33 (Docket 26-a), decided December 11, 1920, is directly in point for the exception of interurban electric railways from the authority given the Labor Board by Sec. 300 of the Transportation Act, is in the same terms as the exception in paragraph (22) of Sec. 1. The Board held that the Piedmont and Northern came within the exception and was excluded from the authority of the Board upon the same grounds as are urged by the Piedmont and Northern in this case against the assumption of authority by the Interstate Commerce Commission under paragraph (18) of Section 1. The decision of the Labor Board, while lacking the authority of a precedent, is nevertheless entitled to the weight which the soundness of its reasoning gives it. We submit that it is well reasoned and sound, and respectfully request that it be read in connection herewith.

It was rendered only a few months after the enactment of the Transportation Act, (February 28th), 1920, while the events which led up to and attended the passage of the

Act were presumably still fresh in the minds of the members of the Labor Board.

The construction placed by the Interstate Commerce Commission upon the language contained in the exception in paragraph (22) of Sec. 1 and in Sec. 20a of the Act, was at first the same as the construction which the Labor Board gave to the same language. As stated in the opinion below (R. 249, 250):

> "On October 12, 1920, the Commission ruled that it did not have jurisdiction over the Piedmont and Northern in regard to the issuance of securities because the road was covered by the exception in Section 20a. This ruling, however, was ex parte and no opinion seems to have been filed. The application of Michigan United States Railways Company, 67 I. C. C. 452, for a certificate of public convenience and necessity, was considered on April 21, 1921. The railroad serves cities in Michigan and adjacent territory and has a physical connection for interchange of business with the Pere Marquette Railway. The Commission's memorandum of 1917 shows that it is 404.16 miles in length and that its passenger revenues were $3,402,002.27, and freight revenues, $392,-633.58 in that year. It was decided that the railroad was covered by the exception in Paragraph 22 of Section 1 of the Act."

The Commission, however, soon departed from these rulings, and in 1922 in Sacramento Northern Ry., 71 I. C. C., 653, 79 I. C. C., 782, and again on February 14, 1927, (shortly before the letter of March 8, 1927, to petitioner), in Ex Parte No. 38, 122 I. C. C., 414, adopted and adhered to the construction which was accepted by the court below, and made the basis of its decision.

We are relieved of the task of discussing the reasoning of the Commission in these cases, separately from the discussion of the reasoning of the court below, because the court below adopted, with elaboration and amplification

the reasoning of the Commission, and our effort to overcome and answer the reasoning of the court is also an effort to overcome and answer the reasoning of the Commission; except that we should point out that in neither of the cases just referred to was the scope of the term "interurban electric railways" as used by Congress in the Transportation Act, 1920, directly and necessarily involved, and what the Commission said on this subject in each of the cases was not really necessary to the decision. In the Sacramento Northern case the Commission found that the electric road was operated as a part of a general steam railroad system of transportation, and this finding, of course, was sufficient to control and determine the decision.

In Ex Parte, 38, 122 I. C. C., 414, the point here involved was not presented, because the Boiler Inspection Act, as amended by the Act of June 7, 1924, (36 Stat. L., 913; 43 Stat. L., 659), the construction of which was involved in that case, leaves out the word "steam." In Sec. 1 of that Act the term "common carrier" is defined so as to exclude street, suburban and interurban electric railways "unless operated as a part of a general railroad system of transportation."

The three things which seem to have influenced and controlled the ruling of the Commission in assuming authority over the proposed extensions and the decision of the court in sustaining the ruling of the Commission were: (1) the word "interurban" which the court interpreted as intended to designate a carrier "engaged in the local carriage of passengers and freight as its primary business" (R. 246); (2) the fact that petitioner's operating revenues are very largely drawn from interstate freight traffic, with the result, as the court held, "that it has crossed the line between an interurban railroad engaged in the general transportation of freight, and a general carrier subject to

the provisions of the statute" (R. 247); and (3) petitioner's ability "to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent." (R. 252).

III

The Court Below Erred in Interpreting the Word "Interurban" as Intended to Limit the Scope of the Words "Interurban Electric Railways" to a Class of Carriers Which are Primarily Engaged in the Local Carriage of Passengers and Freight, and Whose Interstate Operations are, by the Hypothesis of the Classification, Necessarily Restricted and Limited in Extent.

The Court said:

> "Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, *and should be engaged in the local carriage of passengers and freight, as its primary business*, the extension of its line would remain a matter of local concern and should be left to the regulation of local authorities."

Again:

> "Freight traffic may be *limited in extent* and within the scope of a carrier devoted primarily to local business, and at the same time, be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail and express, and yet be so *restricted in its operations* that it may not be properly classified with general steam carriers whose operations cover a wide field." (R. 246).

By definition of the word "interurban" the court below thus introduced into paragraph (22) of Section 1 limitations and restrictions upon the exemption of "interurban electric railways" in addition to the limitation expressly stated in the exception in that paragraph.

It may be conceded that the words do include within their scope electric railways which are primarily engaged

in the local carriage of passengers and freight, and whose interstate operations are restricted and limited in extent; but taken by themselves, without other limiting language, their scope cannot be thus confined.

The very limitations, which Congress attached to the words in other parts of the Act when it did intend to limit their scope, indicate that when used, without such limitations, Congress did not intend that their scope should be limited and restricted as declared by the court below.

The history of the provisions of the Transportation Act, 1920, and of Acts of Congress prior thereto dealing with interurban electric railways, the rulings of the Commission, and decisions of the courts, under the original Act to Regulate Commerce, the amendment of June 18, 1910, and other Acts of Congress interpreting the words "common carrier by railroads" to include interurban but not street and suburban electric railways, (*see U. S. v. Village of Hubbard, 266* U. S. 474), make it manifest that it had been repeatedly brought to the attention of Congress that there were many electric railways, commonly described and designated as interurbans, whose operations in interstate commerce were no less restricted or limited in extent than those of many steam carriers. The Act of June 18, 1910, Chap. 309, 36 Stat. 539, 551, 552, as already noted, authorized and permitted electric railways when "engaged in the general business of transporting freight" to widen their operations in interstate commerce and to expand the extent and increase the volume of their interstate freight traffic through interchange with steam carriers and the participation with them in joint through routes.

"Interurban electric railways . . . engaged in the general transportation of freight" were included under Sec. 15a of the Interstate Commerce Act, as amended by the Transportation Act, 1920, among the carriers put "under the fostering guardianship and control of the Commis-

sion," and for whom provisions were made to enable them "to maintain an adequate railway system for the people of the United States," (See *R. R. Com.* v. *Chicago B. & Q. R. Co.*, 257 U. S., 563, 585; *R. R. Com.* v. *Southern P. Co.*, 264 U. S., 331, 341), instead of being excluded along with carriers whose operations are restricted or limited in extent or service, such as sleeping-car companies, express companies, and independently operated interurban electric railways *not* engaged in the *general* transportation of freight.

On August 29, 1916, Congress incorporated in the Army Appropriation Act the provision known as the Federal Possession and Control Act, (39 Stat. L., 645):

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The Federal Control Act, 40 Stat. L., 451, of March 21, 1918, provided in the seventh paragraph of Sec. 1:

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control,' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: Provided, however, That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal

> source of operating revenue urban, suburban or interurban passenger traffic, or sale of power, heat and light, or both."

Congress here recognized that interurban electric railways competed for traffic with steam railroads; that they connected with such railroads and engaged as common carriers in general transportation, and that some, at least, of them had freight as the principal source of their operating revenue.

The possession and control of petitioner's railway was taken over under the Federal Control Act, and it is apparent that it was taken over as an interurban electric railway which had as the principal source of its operating revenue freight traffic, because as heretofore stated the Director General in reporting to Congress on October 1, 1919, (See letter from Walker D. Hines, Director General, to Hon. John J. Esch, Chairman House Committee, on Interstate and Foreign Commerce, U. S. House Hearings, Vol. 15, p. 2796), the properties in Federal control as of January 1, 1919, included petitioner's railway in the list entitled, "Electric Lines Operated."

When the Transportation Act, 1920, was enacted the word "interurban" had never been used in any prior Act of Congress, ruling of the Commission, or decision of the courts, to designate a road whose operations were necessarily limited in extent and primarily local as compared with steam railroads. "On the other hand, the distinction suggested in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337 . . . between interurban railroads and urban or suburban street railways (had) has been carefully observed. . . . In exercising authority over their passenger fares, no distinction (had) has been made between those interurban roads which were engaged in the general transportation of freight in addition to their passenger and express business, and those

which were not." . . . (*United States* v. *Village of Hubbard*, 266 U. S. 474, 477, 478).

When Congress made the authority of the Commission under paragraph (22) of Sec. 1 and Sec. 20a, and of the Labor Board under Sec. 300 of Title 3, to depend upon whether such railways were orperated as parts of a general steam railroad system of transportation, it adopted the nomenclature commonly applied to electric railways, and followed the distinction between steam railroads and electric railways which had theretofore been repeatedly recognized and applied in the rulings of the Commission, the decisions of the courts, and prior acts of Congress.

In 58 I. C. C., 455, under the title "Electric Railway Mail Pay," the Commission in applying the Act of Congress approved July 2, 1918, 40 Stat. at L., 748, directing the Commission to fix the compensation for the transportation of mail matter "by urban and interurban railway common carriers," adhered to the established grouping of electric railways, saying:

> *"There are three kinds or classes of electric lines,* each of which is employed to some extent in the carriage of the mails. They are known as urban or city lines, suburban lines and interurban lines. Urban lines comprise those operating wholly within city limits.***
>
> *"Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads,* so far as mail transportation is concerned. Many of them do considerable freight and express business in addition to their passenger business."

The above case was submitted to the Commission on December 6, 1919, only a few months before the enactment of the Transportation Act, 1920, and was decided August 7, 1920, only a few months after its enactment.

Many other reports of the Commission of similar import and issued prior to the Transportation Act, 1920, are cited in the footnotes to the Village of Hubbard case. (266 U. S., 474, 478, 479). We shall refer to only a few of them.

In 1913 in *St. Louis, Springfield & Peoria Railroad* v. *P. & P. U. Ry. Co.*, 26 I. C. C., 226, (see also 41 I. C. C., 584; 42 I. C. C., 448), the Illinois Traction System was described "as lines of interurban electric railway." It operated about 425 miles of standard guage electric lines in Illinois, owned some 900 cars, of which 775 were freight cars, and had through routes and joint rates with steam roads to the west, northwest and southwest.

In *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. C., 20, and in *Cedar Rapids & I. C. R. & L. Co.* v. *Chicago & N. W. R. Co.*, 13 I. C. C., 250, descriptions are given of "the interurban electric railroads" specifically mentioned in the Village of Hubbard case, showing that they were laid, the one with 80 pound and the other with 70 pound rail, were well ballasted, and built according to the standards of steam railroad construction. One of them then had in effect through routes and joint rates with a steam railroad, and in those proceedings the Commission established for both of them other through routes and joint rates for freight with steam railroads.

In 1912 in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337, it was held that street railroads were not within the purview of the Act to Regulate Commerce, February 4, 1887, Chap. 104, 20 Stat. 379, because they were not channels of interstate commerce, but were purely local, the court saying:

> "The railroads referred to in the Act were not those having separate, distinct and local street lines, but those of whom it was required that they should

make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

The foregoing distinction between railroads operating local lines and those whose lines connected with the lines of other carriers and were used for the movement of freight in interstate commerce was, as stated in the Village of Hubbard case, made the basis of the Commission's assumption of authority over the rates of interurban electric railways, thus clearly showing that the Commission assumed authority over this class of electric carriers because the class included "a new type of interurban railroad" which was required to "make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

In the Village of Hubbard case (266 U. S. 474, 477), it is stated that the development of interurban roads became general about 1902. The stage of their development in 1912 when the Omaha case was decided, is indicated by the following which the court was careful to add in that case:

> "But it is said that since 1887, when the Act was passed, *a new type of interurban railroad* has been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight."

The further development of electric railways at the end of the year 1917 is indicated by the Commission's Memorandum of electric railway companies reporting to it for

that calendar year. The Memorandum does not include "many of the largest street and electric railways in the United States . . . not considered subject to the Act to Regulate Commerce, because they are engaged only in intrastate business." It shows 267 operating companies, reporting an operated mileage of 15,981.91, and operating revenues of $183,516,437.32, and that of the 267 companies 42 were Class A companies, each having average annual operating revenues of more than one million dollars. Many of the companies reporting, then, had lines of considerably greater mileage than petitioner's railway would have after the construction of the proposed extensions, and operating revenues in excess of petitioner's.

Among the companies shown in the Memorandum was the Spokane & Inland Empire Railroad Company, whose operated mileage was given as 212.54 miles, and total operating revenues as $1,224,909.79, with $307,946.95 from freight, $20,075.74 from express, $11,151.69 from mail, and $817,626.89 from passenger traffic.

In 1915 in *Spokane & Inland Empire Railroad Co.* v. *United States,* 241 U. S. 344, 346, this company was described as operating, in addition to a street railway system in Spokane, Washington, "several interurban electric lines," one of which was interstate, extending from Spokane to Coeur d' Alene, Idaho, a distance of about 40 miles. The road was standard guage, with rails of standard weight. Its freight trains did not enter upon street railway tracks, but started from the company's yards and ran directly to Coeur d' Alene. "The street car business was entirely separate from that done by the interurban line, the employees of the one having nothing whatever to do with the other."

Transportation Act, 1920

The problems, which Congress was called upon to solve by the enactment of the Transportation Act, 1920, and the

conflicts between national and local authority, which the proposed solutions raised are a part of the history of the passage of the Act.

The treatment of electric railways with relation to the new railroad policy introduced by the Act dealing with group rate making and the determination of a fair return, labor disputes, certificates of public convenience and necessity, and the approval of securities, required that due consideration be given both to national and local interests, and also to the plight in which Congress found many electric railways at the termination of Federal control. National and local interests were affected differently by different types of electric railways, and provisions which were appropriate for the regulation of some of them and conducive to their normal and proper development and expansion in the interest of the public would be inappropriate if applied to other types of electric railways.

The local character of many electric railways made the class as a whole of minor importance, as compared with steam railroads of the country, in the proposed scheme of enlarged Federal regulation and control, and naturally lent support to the view that matters intimately connected with the service of electric railways, and their ability to maintain and enlarge their service, such as the construction and abandonment of lines and the issuance of securities, be left under the jurisdiction and control of local authorities instead of being vested in the central authority. (2)

On the other hand, there were many interurban electric railways which had been excluded from Federal control under the proviso contained in the seventh paragraph of Sec. 1 of the Federal Control Act of March 21, 1918,

(2) Memorandum concerning electric railway companies reporting to the Interstate Commerce Commission for calendar year, 1917; U. S. House Hearings before Committee on Interstate and Foreign Commerce, 1919, H. R. 4378, statements of Mr. Chas. E. Elmquist, President National Association of Railroad and Utilities Commissioners. (Vol. 2, p. 1613); and of American Electric Railway Association, (Vol. 3, p. 3418).

which required the exclusion of all interurban electric railways, the major part of whose revenues was from traffic other than freight traffic. Under this provision of the Federal Control Act the Railroad Administration had excluded all electric railways the principal part of whose revenues came from the sources described in the proviso, without regard to the extent of their participation in freight traffic or their capacity to participate in it.(3) When the American Railway Express Company was formed by the Railroad Administration it had diverted business from interurban electric lines not under Federal control to Federal controlled lines, notwithstanding the fact that prior to Federal control many electric railways had handled express under contracts with the express companies and had received substantial revenues from this source. (Proceedings of the Federal Electric Railways Commission, held in Washington, D. C. during the months of July, August, September and October, 1919. Vol. 1, pp. 705, 728.) The result had been that many interurban electric railways which had been excluded from Federal control had suffered large losses of revenues, or their officials had been constantly apprehensive of losses, because they had been denied, or apprehensive that they would be denied, participation with Federal controlled lines in through joint rates; notwithstanding the fact that their construction and equipment were such as to enable them to participate in such routes and to interchange freight with steam carriers, and notwithstanding the further fact that prior to Federal control they had in many cases so participated and interchanged freight, as provided by the Act of June 18, 1910, (Chap. 309, 36 Stat. 539, 552), and the rulings of the Commission made under the authority of the Act, and

(3) U. S. House Hearings before Committee on Interstate and Foreign Commerce, 1919, H. R. 4378, Mr. Sanford Ladd, representing Michigan Railroad Company and Michigan Railway Company, (Vol. 2, p. 1933); See also 67 I. C. C., p. 452, in which the Interstate Commerce Commission ruled on April 21, 1921, that the electric railway described by Mr. Ladd was within the exemption given by Paragraph (22) of Section 1; statement of Mr. J. D. Cornell, (Vol. 2, p. 1947).

in fact even before the Act. These roads were general carriers of interstate freight, and were so constructed and equipped as to enable them to participate in through routes and to interchange freight with steam carriers. (4) Their functions were in many respects similar to the functions of many steam railroads, and their freight revenues were below their passenger revenues only because they had been deprived of the opportunity to engage in freight business to the extent that they were capable of engaging in it, and not because of inferior construction and equipment, inefficiency of organization, or other incapacity for such service. The plight and condition of these roads and their capacity to handle traffic made it advisable that they be embraced within the protective provisions of the Act, designed to assure to the carriers of the country a fair return upon their property value, and to foster and strengthen the national transportation system, principally those provisions incorporated in Sec. 15a of the Interstate Commerce Act, as finally amended by the Transportation Act, 1920.

The different angles from which the regulation and control of electric railways had to be considered forcefully brought to the attention of Congress that there were various kinds of interurban electric railways, rendering various kinds and classes of service, some engaged principally in the carriage of passengers, with limited freight facilities, others engaged as general carriers of interstate freight, performing in a large measure functions similar to those performed by many steam roads, some of them drawing the major part of their operating revenues from freight traffic, while still others were operated as parts of

(4) Commission's memorandum referred to in Note (2); also citations in Note (3). That interurban electric railways were engaged in the general transportation of freight and performed many of the functions of steam railroads and competed with steam railroads, was brought to the attention of Congress in 1910 when the Act of June 18, 1910, relating to the establishment of through routes, etc., between electric railways and railroads of a different character was before the House Committee on Interstate and Foreign Commerce; statement Mr. J. C. Lincoln, (Vol. 7, pp. 463, 464, U. S. House Hearings 1910); statement Mr. Lewis S. Cass, (Vol. 18, p. 1027, U. S. House Hearings, 1910).

a general steam railroad system of transportation. Certainly the conditions which prevailed brought it to the attention of Congress, and this is the point we wish particularly to emphasize, that there were interurban electric railways, which were engaged in the general transportation of interstate freight, and that the operations of many of them were no less restricted or limited in extent than the operations of many steam carriers.

With these conditions before it Congress, in enlarging the powers of the Commission by the amendments introduced by the Transportation Act, "provided expressly, in five sections, for the exclusion of *certain electric railways* from the operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case," to-wit, in the new section 15a dealing with the determination of a fair return. (See *United States* v. *Village of Hubbard,* 266 U. S. 474, 479,480, and footnote 7.)

It met the need for remedial relief of those interurbans which had suffered by reason of exclusion from Federal control by including them within the authority given to the Commission by Sec. 15a, thus giving them the assurance of a fair return which that section held out to carriers, and entitling them to the other benefits and imposing upon them the obligations of the provisions of that section, which were designed "to provide the people of the United States with adequate transportation," clearly treating and providing for them as general carriers of interstate commerce and as important factors, either actual or potential, in the "great interstate railway system of the country."

It met the need that electric railways be left free to extend and expand their service under the jurisdiction and control of local authorities by excluding them from the

powers given the Commission over the construction and abandonment of lines and the issuance of new securities, with one exception. Congress was unwilling that the Commission's authority should be divided with local authorities where an electric railway was operated as a part of a general steam railroad system of transportation, because such a division would put those parts of the system operated by steam under the authority of the Commission and leave the electrically operated parts under the local authorities; but no such objection existed in the case of an interurban electric railway not operated as a part of a general steam railroad system of transportation, even though engaged in the general transportation of freight.

IV

If Petitioner's Railway is Within the Scope of the Words in Question its Ability "To Commit the Mischiefs of Uncontrolled Expansion Which the Act Was Designed to Prevent" Furnishes no Valid Reason for Denying to Petitioner the Exemption Which it Claims.

We respectfully submit that notwithstanding the able and painstaking consideration which was given the case below, the court failed to give effect to the statutory test of the right to the exemption in question. It said of petitioner, and this appears to be the real basis of the decision, that "even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so simliar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent."

The exemption of interurban electric railways by paragraph (22) was made only because, unless exempted, those which were engaged in interstate commerce would have come within the reason and policy underlying the provis-

ions of paragraphs (18) to (21) of Sec. 1 of the Act. Petitioner's claim of exemption is based on the words of the statute as finally enacted.

The claim of exemption cannot be met and denied by an argument intended to show that the line of demarcation as drawn by Congress was not drawn in accord with "the rule of reason"; that it did not accurately follow and mark the bounds of the policy underlying the provisions in question. Statutory lines of demarcation seldom do, and hardly ever do, when they are drawn as a compromise of ideas and interests. The field of the Federal power to regulate interstate commerce is an historical field of compromise between national and local authority. Congress in the Transportation Act, 1920, did not occupy the full field of its competency; it exempted and left to local authorities territory which might have been occupied. The line of demarcation which Congress drew in fixing the Commission's authority over the construction and abandonment of interurban electric railways, left within this exempted territory those interurban electric railways not operated as a part of a general steam railroad system of transportation. The fact that now and then, or even frequently, one of them left within the exempted territory may increase and expand its business so as to exhibit an ability "to commit the mischiefs of uncontrolled expansion," and threaten the integrity of the railroad policy introduced by the Transportation Act, 1920, affords no justification for the obliteration of the line of demarcation as fixed in the statute. On the contrary, it calls for a rigid application of the principle that as the law is written so must it be applied.

"It is not for the court to say, where the language of the statute is clear, that it shall be so constructed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions." (*Dunn* v. *Reid*, 10 Pet. 524.)

If the exemption be an unwise one, or not wisely limited and restricted, the remedy lies with Congress. Congress has the power to take it away entirely, and certainly has the power to attach to it such further limitations and exceptions as it may deem wise.

V

The Decree Below Denying Petitioner the Exemption Claimed Under Paragraph 22 of Section 1 of the Interstate Commerce Act, as Amended by Transportation Act, 1920, Cannot be Sustained Under the Principle and Rules of Interpretation Approved in Texas & P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266.

Texas & P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266, involved the right of the Santa Fe to construct and operate certain steam railroad mileage without first obtaining from the Commission a certificate of public convenience and necessity, and the question presented was whether the mileage was an extension within the authority conferred on the Commission by Paragraph (18), or an industrial track within the exemption of such tracks when located wholly within one state given by Paragraph (22).

The court, as we construe the opinion, did not hold that rulings of the Commission and decisions of the courts, and certainly did not hold that prior Acts of Congress dealing with the same subject, are no guide to the meaning of the terms in the Transportation Act, 1920. It said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs (18) to (22) is furnished by the context and by the relation of the specific provisions here in question to the railroad policy manifested by Transportation Act, 1920."

Petitioner relies upon the principles announced in this opinion.

The context of Sec. 15a is a true guide to the meaning of the words "interurban electric railways . . . engaged in the general transportation of freight," used in the exception in that section, and if all other guides should be disregarded, it alone leads to the conclusion that Congress intended to include electric railways such as petitioner's within the meaning of those words; and also leads to the further conclusion that inasmuch as such railways were covered by the exception in that section and were not covered by the exception in paragraph (22), Congress intended them to be included under the exemption given by that paragraph to "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

It is only necessary to apply to the context of Sec. 15a the rule expressed in the maxim, noscitur a sociis, to be convinced both by process of inclusion and exclusion that the court below was in error in holding that Congress intended by the words in question to designate and describe an electric carrier "engaged in the local carriage of passengers and freight as its primary business," which was "restricted in its operations," and whose "freight traffic (was) limited in extent." (R. 246.)

Interurban electric railways engaged in the general transportation of freight, we must repeat, were included under Sec. 15a among the carriers which Congress put "under the fostering guardianship and control of the Commission," and for whom it made provisions designed to enable them "to maintain an adequate railway service for the people of the United States."

They were dissociated from interurban electric railways not operated as a part of a general steam railroad system of transportation not engaged in the general transportation of freight, from street or suburban electric railways unless operated as a part of a general steam railroad

system of transportation, from sleeping-car companies and express companies, all of which may be described as special or limited carriers whose operations are restricted or whose service is limited in extent, and all of which were excluded from the provisions of Sec. 15a by the definition of the term "carrier" contained in paragraph (1) of that section.

The fact that the Act reveals a different policy in relation to electric railway mileage from that revealed in relation to steam railroad mileage, must also be borne in mind.

Exemption from Federal authority is the policy in relation to the construction of interurban electric railways and the general rule of the provisions dealing with their construction, and inclusion under Federal authority the exception. On the other hand, in relation to the construction of steam railroad mileage inclusion under Federal authority is the policy of the Act and the general rule of the provisions dealing with the construction of such mileage, and exemption the exception. All steam railroad mileage is within the authority conferred on the Commission by paragraph (18), except as specifically excepted by paragraph (22); whereas all interurban electric railways are exempt from the authority conferred with the specific exception of those operated as a part of a general steam railroad system of transportation. With this one exception the exemption of interurban electric railways is as broad as the authority conferred.

Most railway systems operated exclusively by electricity were at the time of the passage of the Transportation Act, 1920, and still are, small as compared with those operated exclusively by steam, or partly by steam and partly by electricity. There were, of course, at the time of the passage of the Act small steam railroads whose operations affected interstate commerce much less than some of the

larger interurban electric railway systems; but the policy of Congress in relation to each of the two classes of railways was not determined by extremes in either class. Exemption was not given to small steam railroads, nor denied to large interurban electric railways.

The policy which controlled Congress in the passage of the Act must, of course, control in its interpretation and construction. A little steam railroad could not successfully contend that because it was little, and its construction and operation would have little effect on interstate commerce, it should be treated as an interurban electric railway and given exemption from the authority conferred on the Commission over the construction of steam railroads. The contrary is equally true, and a large interurban electric railway cannot be treated as a steam railroad and denied exemption merely because it is large and its construction and operation may materially affect interstate commerce.

The court below said:

> "The difference in language between the exception in Section 15a and the exception in Section 1, Paragraph 22, may not be ignored, but it is accounted for by the fact that in one case Congress was dealing with rates, and in the other, with the construction of new lines. It evidently concluded that if an electric interurban road should build up a business of transporting property to such an extent as to be engaged in the general transportation of freight, it should be included in the general rate adjustment provided in Section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be engaged in the local carriage of passengers and freight, as its primary business, the extension of its lines would remain a matter of local concern and

should be left to the regulation of local authority." (R. 246.)

We submit that the definition or conception of an interurban electric railway engaged in the general transportation of freight, which controlled the court below, and its failure to give effect to the difference in language between the exception in Sec. 15a and the exception in Sec. 1 paragraph (22), were largely due to a misapprehension of the scope and purpose of Sec. 15a of the Act. It was not necessary for Congress to put interurban electric railways engaged in the general transportation of freight under Sec. 15a in order to give the Commission authority over their rates and over connections between them and steam railroads. The authority of the Commission to regulate rates and connections between carriers was not conferred by Sec. 15a, but by Sec. 15 and other provisions of the Act. The Commission had exercised this authority over interurban electric railways for years before the provisions of Sec. 15a were introduced into the Act by the Transportation Act, 1920, and in its exercise had made no distinction between interurban railroads engaged in the general transportation of freight and those which were not. (See *U. S.* v. *Village of Hubbard*, 266 U. S. 474, 477.)

Section 15a deals primarily with other matters to which we have already referred, and its vital relation to the new policy of enlarged Federal control of interstate carriers introduced by the Transportation Act, 1920, is made manifest in the following statement from *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 478:

> "The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the

railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

Interurban electric railways engaged in the general transportation of freight would not have been included under that section if Congress had intended that the scope of those words should include only electric carriers which are primarily engaged in the local carriage of passengers and freight and whose interstate operations are necessarily restricted and limited in extent. Undoubtedly if Congress had intended that the scope of the words should be so limited, they would have been of too little consequence to be included in this vital part of the enlarged scheme.

VI

The Court Below Erred in Assuming That "Interurban Electric Railways" Within the Scope of Those Words in the Transportation Act, 1920, Are Not General Carriers; And in Holding That Petitioner's General Freight Business "Has Become So Great That It Has Crossed the Line Between an Interurban Railroad, Engaged in the General Transportation of Freight, and a General Carrier Subject to the Provisions of the Statute."

The court said:

"It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont and

> Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn there can be no doubt that a railroad, 92% of whose traffic comes from the general transportation of freight, and 95% of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad." (R. 246, 247.)

(1) The court, as we have undertaken to show, was in error in assuming that interurban electric railways engaged in the general transportation of freight, within the scope of those words in the Transportation Act, 1920, are not general carriers of interstate commerce. Moreover petitioner's railway is subject to all the provisions of the Act applicable to a "common carrier by railroad," except as interurban electric railways of its type are excluded or exempted from certain of the provisions of the Act.

(2) Neither freight business nor engaging in interstate commerce and carriage is a distinctive service of "a general steam railroad" any more than passenger business or engaging in local commerce and carriage is a distinctive service of an interurban electric railway. Either type, if a general carrier, must handle both kinds of business in either local or interstate commerce.

What we submit is the fallacy in the foregoing statement of the court may be illustrated if we take two interurban electric railways exactly similar in every respect, both having at the start annual passenger revenues of three million dollars and annual freight revenues of two million dollars; one loses by far the greater part of its passenger business, due to circumstances beyond its control, the other retains its entire business of both kinds. Surely the first one does not with the loss of its passenger business also lose its right to the exemption which the Act gives to interurban electric railways. Certainly it has not

become a more potent factor in railroad transportation or a more formidable competitor of steam railroads.

The illustration of the railway, which lost its passenger business, is applicable to petitioner's railway. Its annual revenues for the years 1913 to 1926, inclusive, are given at page 208 of the record. In 1918 its passenger revenues exceeded its freight revenues by approximately $150,000. Since then there has been a gradual decrease in its passenger revenues and a more pronounced increase in its freight revenues. This is accounted for by the increased use of private automobiles and motor busses over the improved roads which in recent years have been constructed throughout the territory in question, and to the increased demand for freight service which has existed in the same territory during the same period. (R. 140.) There has been no change in the essential character of petitioner's railway, or in the manner of its service, or its methods of operation. It still does all the passenger business it can get, and handles it in the same manner in which it handled it in 1918, and would continue to handle it in this manner after the construction of the extensions. The only effect that the construction of the extensions would have on petitioner's passenger business would be that the longer milegae afforded would probably enable it to regain some of the lost business. (R. 142.)

Petitioner now handles its freight business in the same manner in which it handled it in 1918, and would continue to handle it in the same manner after the construction of the extensions. In 1918 it operated over city streets, used the street railway systems to pick up and disdistribute freight within the cities, and gathered up and delivered freight and performed a switching service all along its lines, as it still does and would continue to do after the construction of the extensions. The only effect which the construction of the extensions would have on

petitioner's freight business would be that they would afford petitioner a few additional connections with steam railroads and increase its operated mileage.

In the beginning, at least, and at the time of the passage of the Transportation Act, 1920, petitioner was an interurban electric railway. The gravamen of the opinion is that by merely exercising with efficiency and success the privileges which under the Act it was free to exercise it has outgrown its original character and must now "be placed in the same category as a general steam railroad," a proposition, we submit, at variance with the provisions of the Act prescribing the functions electric railways may perform and the traffic arrangements they may make.

(3) The decision leaves the status of electric railways, certainly that of many of them, obscure and uncertain, and furnishes no rule of conduct for the guidance of those engaged in the operation of such railways, or for the guidance of either national or state authorities whereby each may determine the limits and extent of their respective jurisdiction and authority to regulate and control electric railways. The opinion does not indicate, with any degree of definiteness, when an electric railway "has crossed the line between an interurban railroad and a general carrier." The mere fact of engaging in the general transportation of freight, drawing the major part of its operating revenues from freight traffic, making through traffic arrangements with steam railroads and thereby increasing its freight business, does not carry it across the line, because the decision recognizes that it may do all of these things. (R. 245.)

Under paragraph (20) of Sec. 1, if not exempt by paragraph (22), "any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the

provisions of this paragraph, or of paragraph (18) of this section, shall upon conviction thereof be punished by fine of not more than $5000 or by imprisonment of not more than three years, or both."

Sec. 20a dealing with the issuance of securities, the interlocking of officers and directors of carriers, etc. contains the same exemption as paragraph (22) of Sec. 1; and by paragraph (11) imposes even more severe penalties and liabilities for violations of its provisions by a carrier, not exempt, its officers, directors, attorneys and agents, than those imposed by paragraph (20) of Sec. 1.

If the officers, directors, attorneys and agents of an electric railway, which does any of the things covered by these provisions of the Act, fail to solve correctly the "obviously difficult" question, "when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute," they, as well as the carrier they represent, incur the penalties and liabilities imposed by the foregoing provisions of the Act.

VII

The Fact That Congress in the Railway Labor Act of May 20, 1926, (44 Stat. 577), Reenacted and Brought Forward From Tittle III, Section 300, Paragraph (1), Transportation Act, 1920, The Words in Question Which Had Been Interpreted by the U. S. Labor Board to Include The Piedmont and Northern Within the Scope of Their Meaning, Gives Rise to a Strong Presumption That the Interpretation Was in Accord With the Original Intention With Which Congress Used the Words in the Transportation Act, 1920.

It is conceded that the decision of the Labor Board in *Brotherhood of Locomotive Engineers, et al,* v. *Spokane & Eastern Railway, et al,* Decision No. 33, (Docket 26-a,

December 11, 1920), "was directly in point for the exception of certain interurban electric railways from its control by Section 300 of the Transportation Act is in the same words as the exception in Paragraph (22) of Section 1. The Board held that the Piedmont and Northern and other carriers were excluded from its jurisdiction upon the same grounds as are urged by the petitioner in this case to support its argument," (R. 248, 249.)

The Railway Labor Act of May 20, 1926, was passed to take the place of Title III of the Tranportation Act, 1920, 41 Stat. 469, which dealt with "disputes between carriers and their employees and subordinate officials." (See Sec. 14 of the Railway Labor Act.)

It was introduced in Congress as House Bill 7180, and Paragraph (1) of Section 1 of the Bill in defining the carriers subject to its provisions followed exactly the language of Paragraph (1), Section 300, Title 3, of the Transportation Act, 1920, which was the language interpreted by the U. S. Labor Board in its Decision No. 33, except that the word "steam" was omitted, so that the paragraph read:

> "The term 'carrier' includes any express company, sleeping car company, and any carrier by railroad subject to the Interstate Commerce Act, except a street, interurban or suburban electric railway not operated as a part of a general railroad system of transportation."

The bill was referred to the House Committee on Interstate and Foreign Commerce and hearings on it were conducted during January and February, 1926. Objection was made to the omission of the word "steam" on the ground that "the matter of the jurisdiction of the present Railroad Labor Board over independently operated electric railways under the Transportation Act of 1920 was exhaustively considered under Docket 26-a of the Railroad Labor Board, and their decision with reference there-

to was announced in Decision 33 of December 11, 1920. This Decision definitely determined the status of independently operated electric railways of the United States and declared, in substance, that the present Railroad Labor Board had no jurisdiction over such independently operated electric railways. . . . There has, therefore, come into existence a generally accepted construction of the words 'operating as a part of a general steam railroad system of transportation,' and . . . . at this time there is no valid reason for modifying this langauge (by the omission of the word "steam"), in such a way as to require a further lengthy period of uncertainty caused by the lack of definite construction to be placed on the modified language as contained in House Bill 7180." (See U. S. House Hearings on H. R. 7170, pp. 24, 25.) The Bill was also referred to the Senate Committee on Interstate Commerce where the same objection was urged to the omission of the word "steam". (See U. S. Senate Hearings on S. 2306, pp. 120, 121.)

Subsequently to these hearings the definition of the term "carrier" was amended so as to incorporate in the exception the word "steam" and to follow without substantial change the language which had been interpreted by the U. S. Labor Board, so that Paragraph (1) of Section 1 as amended read:

> "First. The term 'carrier' includes any express company, sleeping car company and any carrier by railroad, subject to the Interstate Commerce Act, 'including all floating equipment, such as boats, barges, tugs, bridges and ferries; and other transportation facilities,' used by or operated in connection with any such carrier by railroad, and any receiver or any other individual or body, judicial or otherwise, when in the possession of the business of employers or carriers covered by this Act: Provided however, That the term 'carrier' shall not include any street, interurban,

> or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power."

Entirely apart from any inference to be drawn from the objection made before the Committees to the omission of the word "steam," and the reasons urged in support of this objection, it must be presumed that Congress was familiar with the Labor Board's interpretation of the words, and their incorporation in the subsequent Act gives rise to a strong presumption that the interpretation correctly represents the sense in which Congress used the words in the prior Act.

In *Alexander* v. *The Mayor and Commonalty of Alexandria,* 5 Cranch, 1, 7, 8, the rule was enunciated:

> "If in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

And when applicable the rule has always been observed and treated as controlling on the courts in interpreting the terms of a statute and expounding its provisions. (See 25 R. C. L. Sec. 288; See also *Copper Queen Consolidated Mining Co.* v. *Arizona,* 206 U. S. 474; *Davis* v. *Pringle,* 1 F. (2d), 860, 863; *Dow* v. *U. S.,* 226 Fed. 145; *Schweizer* v. *Mayer,* 297 Fed. 334; *Edwards* v. *Wabash Ry. Co.,* 264 Fed. 610, 618; 36 Cyc. 1153.)

Conclusion

One of the protesting steam railroads introduced much evidence before the Interstate Commerce Commission designed to show the relationship between petitioner and the so-called Duke interests, and the contention was advanced in the court below, and will probably be advanced here, that the relationship, if not illegal and in violation of the Commodities Clause (34 Stat. L. 584), was at least improper and contrary to sound railroad policy.

If the contention were sound, it would still be irrelevant to the question presented upon this record. If the Commission's authority extends to the proposed extensions then it is conceded that its order is valid and must be sustained. On the other hand, if the Commission's authority does not extend to the proposed extensions, then, although the Commission could consider and incidentally determine the question of its authority raised in the application, when once it is determined that the Commission was without authority, no other question connected with the proposed extensions can be considered.

The relationship is not illegal or improper; and the proposed extensions would not be constructed in response to the demand of the Duke interests, but in response to the unanimous demand of State, county, and municipal authorities and members of the shipping and traveling public of the territory in question. (R. 223.)

In conclusion, we submit that, upon the admitted facts and those established without substantial contradiction, that part of the Commissions' order of April 3, 1928, in which it assumed jurisdiction over the proposed extensions was unauthorized, and therefore that the final decree of the District Court should be reversed and a decree entered or directed setting aside and annulling the order of the Commission. The reversal of the decree and the

annulment of the order would leave the way clear for Congress to correct the "mischiefs" of uncontrolled expansion by interurban electric railways or to control them in a well defined and concrete manner—that is, if Congress should entertain the same views of the "mischiefs" as the court below and the Commission. Affirmance of the decree would leave a "No Man's Land" between national and local authority, which could be securely occupied by either only at the end of protracted and wasteful litigation.

Respectfully submitted,

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